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Chairman: Mr. LAMPTEY (Ghana)

CONTENTS

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. CALERO RODRIGUES (Brazil) congratulated the International Law Commission on having completed, on schedule and with its usual high standard, its work on two important topics: the draft statute for an international criminal court and the draft articles on the law of the non-navigational uses of international watercourses.

2. The draft statute for an international criminal court was generally acceptable. Part 3, on the jurisdiction of the court, which had rightly been regarded by the Commission as central to the text, dealt with two main questions: the indication of the crimes within the jurisdiction of the court and the preconditions to the exercise of its jurisdiction.

3. With regard to the first question, the Commission's position was that the statute would be primarily an adjectival and procedural instrument and that it would not be its function to define new crimes or to codify crimes under general international law. However, if a court was to be able to function, there must be an applicable substantive law. That law did not exist, at least in written form, or existed only in an imperfect form. Neither general international law nor treaties provided a sufficiently precise definition of the crimes which were to fall within the jurisdiction of the court to ensure that the two fundamental principles of criminal law were respected: nullum crimen sine lege and nulla poena sine lege. In paragraph (4) of the commentary to article 20, the Commission indicated that certain of those crimes would be defined in the draft Code of Crimes against the Peace and Security of Mankind, although the draft Code was not intended to deal with crimes under general international law since "to do so would require a substantial legislative effort". The Commission should nevertheless rise to the challenge and provide, through the future Code, the substantive law needed for the proper functioning of an international criminal jurisdiction.

4. As for the preconditions for the exercise of the court's jurisdiction, the text submitted in 1993 would have required the agreement of too many States. With the modification introduced into article 20, the list of the States whose acceptance was required for the exercise of the court's jurisdiction had been simplified. That solution was a significant improvement since it considerably increased the possibilities of the exercise of the court's jurisdiction.

5. In the light of the serious international crimes that had been perpetrated in recent times on an unimaginable scale, a general sense of urgency appeared to prevail with respect to the establishment of a permanent international criminal jurisdiction. The international community seemed to be unanimous in its determination that such crimes should not go unpunished. The establishment of the International Tribunal for the Former Yugoslavia and the idea of creating a jurisdiction to deal with atrocities perpetrated in Rwanda reflected that

feeling. Moreover, the deterrent effect of criminal law should not be overlooked. The International Tribunal for the Former Yugoslavia had, of course, had such an effect, but only in a limited way. It was to be hoped that the establishment of a tribunal whose jurisdiction was not limited territorially would have a far stronger effect.

6. It would be possible to establish the court without waiting for the adoption of the Code of Crimes against the Peace and Security of Mankind, on the basis of the list of crimes appearing in article 20 of the draft statute. He wondered, however, whether the two-year delay decided on by the Commission would not be justified if it would allow the court to be established on a much firmer basis. In the belief that the "substantial legislative effort" mentioned by the Commission was possible and necessary, his delegation was of the opinion that the Commission should be asked to continue its work on the draft Code with the same dedication it had applied to the preparation of the draft statute of the court. His delegation did not have an unreserved enthusiasm for either draft; it merely wished to heed the aspirations of the international community and to lend its cooperation in the development of the norms and institutions which might satisfy those aspirations.

7. Mr. HILGER (Germany), speaking on behalf of the European Union and Austria, noted with gratification that the International Law Commission had in 1994 succeeded in concluding the elaboration of a draft statute for an international criminal court. One of the most difficult issues in connection with the draft statute was the question of jurisdiction. With respect to genocide, the court would have jurisdiction without the need for express acceptance by the State concerned. It would also have jurisdiction over matters referred to it by the Security Council. The court would not be an organ of the United Nations and, in the context of article 2 of the draft statute, the central question would be how to forge close ties between the court and the United Nations.

8. Barely a year earlier, the participants in the International Conference for the Protection of War Victims had adopted a solemn declaration in which they had declared their refusal to accept that war, violence and hatred were being spread throughout the world and that the fundamental rights of persons were being violated in an increasingly grave and systematic fashion. Notwithstanding that Declaration, such crimes had not decreased. The European Union and Austria believed that the work on the establishment of an international criminal court must proceed apace and that, in that connection, it was important to take into account the experience of the International Tribunal for the Former Yugoslavia.

9. Provided there was sufficient agreement within the international community, the European Union and Austria were willing to support the Commission's recommendation that the General Assembly should convene an international conference to negotiate a convention on the establishment of an international criminal court. The European Union and Austria would continue to work with the States Members of the United Nations towards that end.

10. Mr. AL-BAHARNA (Bahrain) said that his delegation attached great political and legal significance to the draft statute for an international criminal court, which should be established urgently to try international crimes speedily and impartially.

11. He was convinced that the court could function authoritatively only if it was integrated into the structure of the United Nations. He did not wish to enter into a debate concerning article 2, but would like to see the court established under a treaty. In that event, it would not have the character of a judicial organ of the United Nations nor would there be any need to include a provision concerning its relationship with the Organization such as that in article 2, which could accordingly be deleted. In order to reinforce the status of the court, the phrase "within the framework of the United Nations" could be added after the words "is established" in article 1; that would ensure the principle of universality and would confer on the court the requisite legitimacy and political authority.

12. Article 4 should be modified to read: "The Court is at all times open to States Members of the United Nations and to all other States in accordance with this Statute". That wording would be more appropriate since, notwithstanding its characterization as a "permanent institution", the court lacked a permanent structure. The reasons of flexibility and cost-reduction mentioned in the report of the Working Group in its commentary to article 4 (A/CN.4/L.491/Rev.2/Add.1) were not very convincing.

13. With regard to the election of judges and their qualifications, he said that, in his view, article 6, paragraph 3, was too restrictive since it limited the elective process to States parties to the statute. That function should be conferred on the General Assembly and the Security Council, or on the General Assembly alone. Also with regard to the election of judges, he proposed that the provision in article 6, paragraph 5, should be broadened and should read: "In the election of the judges, States should bear in mind that the representation of the main forms of civilization, the principal legal systems of the world and equitable geographical distribution should be assured."

14. As to the much debated issue of the jurisdiction of the Court, it was a matter of some satisfaction to his delegation that the Commission at its previous session had opted for a unified approach and had specified in clauses (a) to (d) of article 20 a list of crimes under general international law. The question of jurisdiction thus appeared to be resolved satisfactorily, except for article 23, dealing with action by the Security Council. As that issue was one of deep political consequence both for the Court and for the United Nations, it called for careful deliberation. Although the power of the Security Council to constitute an international tribunal for the purpose of trying persons committing crimes against humanity - as in the case of the former Yugoslavia - could not be impugned, it was open to question whether article 21 conformed to the requirement of judicial independence. By making the judicial process subject to the political process, paragraphs 2 and 3 of article 21 curtailed the independence of the Court. There was thus no doubt that those provisions should be modified.

15. As for jurisdiction ratione personae, article 21 had simplified the consent requirement laid down in the 1993 draft. Nevertheless some doubts persisted, since the theory of "inherent" jurisdiction over genocide was open to argument and the question of the States whose consent was necessary could not be foreclosed, as had been done in article 21 (b).

16. The sources enumerated in article 28 left much to be desired, and a reference should be included to what were known as the "new sources" of international law, for example, decisions of international organizations and considerations of humanity.

17. Article 33 (c) should be more specific, since international law did not yet contain a complete statement of substantive and procedural criminal law. The text could be improved by replacing the current wording by: "applicable rules of criminal law and jurisdiction". In addition article 33 would be better placed in part 3.

18. There was a disparity in articles 20 (a) to (d) regarding application of the principle of nullum crimen sine lege, a disparity which might lead to controversy. It would be far more sensible to have a uniform rule, and, to that end, to formulate article 39 to read: "No one shall be held guilty on account of any act or omission which did not constitute a crime under international law at the time it was committed".

19. Article 42, paragraph 2 (b), dealing with the principle of res judicata, should be critically reappraised, since some States might consider it to be a derogation of their sovereign powers with regard to criminal trials.

20. The provisions on evidence contained in article 44 constituted a via media between those who felt that the issue should not be covered in the statute and those who felt that basic provisions should be included. In any event the provisions needed to be more stringent, and he suggested that paragraph 5 should be amended to read: "Evidence obtained directly or indirectly by unlawful means, or in a manner contrary to the rules of the statute or of international law shall not be admissible".

21. With respect to article 47, paragraph 1, it might be difficult for some States to accept a provision excluding the death penalty, but the provision could not be faulted in view of the fact that the death penalty had been condemned by the United Nations. Paragraph 2 of article 47, on the other hand, needed further study, since its current drafting did not indicate the relative importance of paragraphs (a), (b) and (c), and conflicts might arise if the penalties mentioned differed from one State to another.

22. Before presenting its views on the draft Code of Crimes against the Peace and Security of Mankind, his delegation wished to point out that, since the Commission was now engaged on a second reading, it should avoid making major changes in the draft articles adopted on first reading, and should, to avoid contradictions, harmonize the draft Code to the extent possible with the draft statute of an international criminal court.

23. The compromise formula suggested by the Special Rapporteur for article 1 of the draft was acceptable, in that it combined a conceptual definition with an enumerative one. The phrase "under international law" should be deleted.

24. Notwithstanding the reservations formulated by some Governments, it would be a retrograde move to delete article 2, since it embodied the autonomy of international criminal law vis-à-vis internal law. Article 2 could, however, be modified to read: "The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that the act or omission in question is not a crime under internal law does not exonerate the accused".

25. The general principle regarding the criminal responsibility of individuals contained in article 3 of the draft had generally been accepted by States. Application of the concept of attempt should be left to the competent courts. In that connection the text of article 3, paragraph 3, could be amended to read: "An individual who attempts to commit one of the crimes set out in this Code is responsible therefore and is liable to punishment. Explanation: 'Attempt' in this paragraph means an act or omission towards the commission of a crime set out in this Code which, if not interrupted or frustrated, would have resulted in the commission of the actual crime".

26. Article 4 had been a bone of contention between those who considered it to interfere with the rights of defence and those who thought it important, especially in connection with a political offence. His delegation would support its deletion, provided that its contents were incorporated in the article on extenuating circumstances.

27. Draft article 5 seemed acceptable and should be retained, with some drafting improvements. Draft article 6, which was extremely important, should be linked with international criminal jurisdiction, and, accordingly, harmonized with the draft statute of an international criminal court. A possible solution would be to make article 6, paragraphs 1 and 2, of the draft Code subject to article 53 of the draft statute, and to drop paragraph 3. Alternatively, article 6, paragraph 3, could be amended to include within its ambit the essence of article 53 of the draft statute. His delegation had some misgivings regarding the peremptory nature of the rule in article 6, paragraph 2, which might be addressed by replacing the words "shall be given" by "may be given".

28. The view that article 7 of the draft should be deleted appeared to go against the letter and spirit of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Accordingly the scope of the article should be confined to "war crimes" and "crimes against humanity" since, in the absence of such a provision, States might apply different norms regarding statutory limitations, which would weaken the international system.

29. Article 8 of the draft should be harmonized with article 41 of the draft statute of an international criminal court in order to eliminate the divergence between the two texts as to the admissibility of a trial in absentia.

30. Draft article 9 allowed for trial by the international court if the trial in a national court had been a "sham". That exception to non bis in idem constituted a derogation of the principle of territorial sovereignty and had led to acute criticism by some States.

31. Draft article 11 was based on principle IV of the Principles of International Law recognized in the Charter and Judgement of the Nürnberg Tribunal. It would be preferable to stay closer to the text of that principle, so that the article would read: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, provided a moral choice was in fact possible for him".

32. Despite the reservations expressed by some members of the International Law Commission, draft article 12 appeared reasonable, and it might not be prudent to modify the text adopted on first reading. Draft article 13, which was squarely based on principle III of the Principles of International Law recognized in the charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, should also remain as it was.

33. The defences contained in draft article 14 should be discussed separately from the extenuating circumstances dealt with in article 15. It might perhaps be appropriate to include in the text of article 14 the elements mentioned by the Special Rapporteur in paragraph 159 (a), (b) and (c) of his report A/CN.4/460. In addition, it would be desirable for the International Law Commission to examine the tenability of including other defences, such as "insanity", "mistake", etc. The text of draft article 15 should be harmonized with that of article 46 of the draft statute of an international criminal court. In addition, it should deal with both extenuating and aggravating circumstances.

34. Mr. THIAM (Guinea) congratulated the International Law Commission on its excellent report and on the progress made with respect to the items on its agenda. Its praiseworthy efforts at the codification and harmonization of international law served the purpose for which it had been established by the General Assembly in resolution 174 (II), in that ensuring the primacy of law was the principal guarantee of international peace, security and cooperation.

35. Referring to the draft statute of an international criminal court, he said that he had already expressed his preference for a permanent court consisting of a prosecutor, independent judges and a registry, functioning as a subsidiary organ of the United Nations, which would confer on it the universality, authority and permanence of that Organization. Although it could be established by resolution of the General Assembly or the Security Council, it would be preferable for the court to be established by a convention adopted by a conference of plenipotentiaries.

36. Where the applicable law was concerned, he welcomed the fact that the International Law Commission had abandoned the restrictive approach, in that article 20 of the draft statute gave a complete list of the crimes over which the court had jurisdiction. That list had the merit of expressing the

fundamental guarantee of criminal justice, namely the principle nullen crimen sine lege.

37. Article 54, which established the principle aut dedere aut judicare, conferred on the statute the character of written justification for action in the case of a State which did not accept the Court's jurisdiction.

38. Article 23 was based on an approach much better than that of leaving to the Security Council the decision to establish ad hoc tribunals in each specific case, in that the proliferation of ad hoc jurisdictions would not permit the establishment of international criminal case law. Moreover, the permanent nature of the Court would enable the judges to enrich their case-law experience.

39. Apart from the crimes which were within the specific jurisdiction of the court, the right to refer matters to it should not be reserved exclusively to the Security Council; a major role should also be assigned to the General Assembly. The "negative" veto provided for in article 23, paragraph 3, recognized simultaneously the priority assigned to the Security Council and the need to coordinate the activity of the Council and that of the court. Moreover, the substantial inequality between States members of the Security Council and those that were not members which article 23 appeared to introduce derived from the composition of the Council, not from an imbalance created by the provision in question.

40. According to the draft statute, any State that had accepted the jurisdiction of the court could lodge a complaint with it. That provision, which established a link between the litigant and the jurisdiction, was not simply a means of promoting recognition of the jurisdiction of the court, but established an obligation to cooperate with it, thus giving it authority, credibility and effectiveness.

41. The view which had prevailed that the procurator should not be authorized to initiate an investigation in the absence of a complaint was correct, since it would avoid the risk of a situation arising in which the criminal was in the territory of a State that had not accepted the court's jurisdiction.

42. The autonomy of the Prosecutor was superfluous in international law, and reinforced the principle that the complaint was the mechanism that triggered the investigation. Once the complaint had been declared admissible, the Prosecutor enjoyed the necessary autonomy to initiate proceedings against the persons suspected of having committed an international crime. The requirement that the Presidency must confirm the indictment drawn up by the Prosecutor appeared to be an additional guarantee of the rights of the accused. Only on the basis of that confirmation did the suspect become an accused. Naturally, confirmation of the indictment could not prejudge the decision of the court.

43. The establishment of a double level of jurisdiction distinguished the court from ad hoc tribunals established for specific cases, thus avoiding accelerated or summary proceedings. Those two levels, one for trial and the other for appeal against the decisions taken at the trial level, afforded an opportunity

to establish in a universal manner the principle of dual jurisdiction recognized in the covenants on human rights as a basic procedural guarantee. Moreover, the combination of appel and cassation within the court was in response to the concern for rapidity of proceedings. Lastly, the draft statute assigned to the Presidency the power of revision, thus closing the entire procedural cycle and meeting the desire for equity expressed by the international community in the covenants. In conclusion, to give the court the required efficiency, States would have to cooperate with it in the various phases of the proceedings, particularly in investigation, provision of evidence and extradition of presumed criminals.

44. Recent events in Liberia, Rwanda, Somalia and the former Yugoslavia demonstrated that the code of crimes against the peace and security of mankind was still relevant. The General Assembly had been dealing with that issue since 1947, when it had entrusted the International Law Commission with the preparation of a draft code of crimes, an ideal instrument for the prevention and suppression of acts which endangered civilization.

45. With regard to the definition of crimes, a general formulation followed by an indicative, non-limitative enumeration setting forth the relevant criteria for drawing up the list of crimes would be preferable. The sovereignty accorded to the judge to characterize the offence was acceptable, in that it strengthened the principle nullum crimen sine lege, and allowed him to perform an important role in characterizing the actions and omissions attributed to a person.

46. With regard to the responsibility of the State for the actions of its agents, he shared the view expressed by the Special Rapporteur in article 5 to the effect that the State was responsible only for acts committed by persons connected to it by undeniable links of subordination. In that criminal responsibility was personal and individual, it was inconceivable with respect to the State, which was a moral person not subject to penal measures.

47. The debate as to the scope of article 6 demonstrated that the establishment of an international criminal court offered an ideal solution to the problem of positive or negative conflicts of jurisdiction and guaranteed the inevitability of punishment for persons committing crimes against humanity.

48. The principle of non-applicability of statutory limitations provided for in article 7 was designed to ensure the punishment of the perpetrators of those crimes. However, as the Special Rapporteur had observed, that provision might be a bar to amnesty and national reconciliation, and its absoluteness might have drawbacks. The solution would be to adopt a long period of non-applicability and to provide for States to adopt amnesty measures when to do so would advance national reconciliation.

49. Exceptional seriousness being one of the criteria for categorizing an action or omission as a crime against humanity, other aggravating circumstances were unnecessary, since they were implied in the definition itself of the crime.

50. When, at the end of the Second World War, the international community had embarked on the task of harmonizing the principles of international law, its purpose had been to seek security and peace and cooperation among States. While the solutions proposed by the Commission would not satisfy everyone, the objective should be to provide options that reflected the interests of the majority, not to meet the individual demands of each State. Undoubtedly, the Commission had performed its task most satisfactorily.

51. Ms. BONINO (Italy) congratulated the Chairman of the International Law Commission on his clear and comprehensive introduction of the Commission's report, which provided a sound basis for a discussion as substantial as required by the importance of the issues.

52. Turning to the new draft statute for an international criminal court, she said that it was a definite improvement over the previous draft, since it completed issues that were unsettled or insufficiently addressed. It was flexible and balanced and reconciled the need for an effective international court with respect for State sovereignty. Although there was certainly room for improvement, the draft laid a solid foundation for negotiations towards achieving international consensus. There was no reason for the United Nations to delay its response to the tragedies of entire populations and the most blatant violations of fundamental humanitarian principles. The draft provided an appropriate legal instrument for such a response.

53. Regarding the establishment of the court and its relationship to the United Nations, she supported the solution envisaged in the draft statute, namely, a treaty commitment and the conclusion of a relationship agreement between the United Nations and the presidency of the court. While the idea of amending the Charter to establish the court as a principal organ of the United Nations was appealing, it would create problems and the risk of delay. The proposal to establish the court as a permanent institution that would meet only as required was acceptable.

54. Regarding the composition and administration of the court, she was glad to note that the terminology had been simplified by the elimination of the reference to the "Tribunal". The method of selecting judges seemed to respond to the need for impartiality and competence, although a rigid distinction between recruiting judges on the basis of their criminal trial experience or of their competence in international law might conceivably be a bar to the appointment of persons with both qualifications. She also welcomed the separation of trial and appellate functions and the reiteration of the fundamental principle of independence of the judges and of members of the procuracy.

55. Among the most delicate questions were subject-matter jurisdiction and State acceptance of its jurisdiction. The new draft indicated a feasible way to balance the various interests. For example, it abandoned the distinction between treaties which defined crimes as international crimes and treaties on the suppression of conduct constituting crimes under national law, thereby reducing the complexity of the system. At the same time, the annex referred to

in article 20 (e) included the 1988 Convention against Illicit Traffic in Narcotic Drugs and the 1984 Convention against Torture. While the new statute did not confer on the court generic jurisdiction over violations of customary international law, it granted the court jurisdiction over four types of specific crimes: genocide, aggression, serious violations of the laws applicable in armed conflicts and crimes against humanity.

56. The system of acceptance placed limits on the court's jurisdiction. An excessive reduction of jurisdiction by the sum of individual States' declarations should be avoided. In principle, she favoured an "opting-out" system that would give States parties the right to exclude some crimes from the court's jurisdiction. However, she recognized that the Commission's "opting-in" approach had its merits and could well facilitate wider acceptance of the statute.

57. The solutions contained in article 23 on the court's jurisdiction resulting from an action by the Security Council were appropriate. She welcomed the fact that the Security Council would be entitled to refer matters to the court, as an alternative to establishing ad hoc tribunals, an approach which her delegation considered positive in the absence of a permanent court, but which could not always be the answer to crimes that affronted the conscience of humankind.

58. Part 4, "Investigation and prosecution", and part 5, "The trial", established a satisfactory system consistent with the principles of justice and protection of the fundamental rights of the accused. She was pleased to note that certain changes reflected the remarks made by her delegation in 1993. For example, thanks to the exclusion of capital punishment from the sentences that the court was authorized to impose, the system established was consistent with every human being's fundamental right to life. As far as international cooperation and judicial assistance were concerned, she commended the incisive and well-balanced text in the articles specifying States' duties, especially in the areas of transfer of an accused to the court and obligation to extradite or prosecute.

59. Crimes against humanity were being committed: yesterday in Somalia, today in Rwanda and Bosnia and tomorrow in other parts of the world. The perpetrators of those brutal acts were often rewarded with impunity because there was no international authority to track down and punish offenders. The discussion of an ideal structure for an international criminal court could continue, interminably, but the worsening of international crises had reduced the time available to reflect, public opinion demanded action, and the court was the most advanced instrument for counteracting the risk that the law might lose its effectiveness. It was time to take swift action by creating a judicial mechanism with the necessary authority and operational structures to punish the most serious of international crimes.

60. The draft statute was ready to be discussed by Governments with a view to finalizing the instrument that would establish the new jurisdictional body. The General Assembly should decide at the current session to convene a diplomatic conference in 1995 to conclude a convention to that effect. In so doing, the

international community would show full respect for human dignity and avoid any complicity with those responsible for heinous crimes, wherever they were committed. Italy would be honoured to host the diplomatic conference concerned.

61. Although legal problems remained to be solved, public opinion would not tolerate further delays. The moment had arrived for the international community to give the world a clear sign of its will for peace with justice. Every postponement, every ambiguous or hesitant message, would create a dangerous gap between public opinion and the United Nations, emitting the wrong signal as preparations were being made to celebrate the Organization's fiftieth anniversary. Peoples who believed that justice was the foundation of international society needed such a response.

62. Mr. HAYES (Ireland) said that, during the deliberations on the establishment of an ad hoc tribunal for the prosecution of crimes committed in the former Yugoslavia, his delegation had indicated that that should not prevent the Commission from continuing to study the establishment of a permanent international criminal court. Accordingly, it supported the Commission's recommendation that the General Assembly should convene an international conference of plenipotentiaries to study the draft statute of the court and to conclude a convention on its establishment.

63. The structure and provisions of the draft statute which the Committee had before it were acceptable. His delegation welcomed, in particular, the fact that the draft statute specified that the court was intended to be complementary to national criminal justice systems. Perhaps its jurisdiction should be limited at the beginning to what was described as inherent jurisdiction; it could then be extended as confidence in the court grew and the need for wider jurisdiction was recognized. In any case, there must be certainty about both the limits of jurisdiction and the crimes covered. In that connection, the provisions of draft article 23 on action by the Security Council should be analysed more carefully.

64. His delegation welcomed draft article 37, which excluded trial in absentia, except in circumstances which might be regarded as falling outside that classification. It also supported the language of article 42, which recognized the principle of non bis in idem and whose limitations seemed reasonable. On the other hand, draft article 48, in so far as it permitted appeal against acquittal, warranted further consideration.

65. Mr. HARPER (United States of America) said that his delegation had closely followed the question of the establishment of an international criminal court, as it was firmly committed to the fight against crime, particularly crime which affected the international community. His Government was also committed to bringing to justice persons who had violated international humanitarian law. It had therefore supported the establishment of an international tribunal for the prosecution of war crimes committed in the former Yugoslavia and the establishment by the Security Council of a similar court to deal with Rwanda. Interest in establishing a permanent court was understandable in view of the atrocities committed in both countries and elsewhere in the world; the problem

was how to address the needs and concerns of the international community in that regard. War crimes, crimes against humanity and genocide were the most compelling arguments for the establishment of a permanent court, since they directly affected issues of peace and security; on the other hand, that need did not seem so clear in other situations. The key issue was to determine the extent to which a permanent court would ensure the prosecution of persons who had committed serious crimes and whether the court would help or merely hinder national efforts to that end.

66. The work of the Commission in that regard was highly commendable, but United States support for the establishment of a permanent court would depend on the solution of a number of fundamental problems. First and foremost, his delegation must be assured that the court would be of a complementary nature and that the new system would not undermine existing law enforcement efforts. Guidelines must therefore be established in order to determine which cases should be heard by the court. If the jurisdiction of the court included crimes covered by terrorism conventions, cases should be initiated only with the consent of the States which were directly interested. Moreover, States which had signed extradition treaties or status of forces agreements with the custodial State should have the right to reject the jurisdiction of the international court.

67. His delegation did not believe that drug-related crimes should be included in the court's jurisdiction, as it believed that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was not specific enough to form the basis for criminal charges. In that connection, it would be preferable if such cases were to be submitted to national courts. Establishing that States with direct interests in terrorism cases should give their consent in order for the court to declare that it had jurisdiction would help to ensure that national efforts, including existing cooperation in extradition and mutual assistance, were not undermined.

68. His delegation trusted that, in the absence of a consensus, States would not insist on the draft Code of Crimes against the Peace and Security of Mankind, since including such crimes in the jurisdiction of the court would raise a number of additional concerns. The Security Council should have sole authority to determine whether the court was competent to hear cases involving war crimes, crimes against humanity or genocide, for those crimes were of significance to all States and would always be committed in connection with situations which threatened international peace and security.

69. With respect to the operation of an international criminal court, careful consideration would have to be given to the fact that international judicial proceedings were extremely expensive. Thus, States parties should understand in advance the financial consequences of establishing such a court.

70. An ambitious project had been completed and it was now a time for States to engage in consultations and decide on future action. The General Assembly should establish an ad hoc committee that would meet before its fiftieth session in order to discuss issues related to the establishment of the court and decide

whether a diplomatic conference should be convened. Before an institution of such importance and permanence was established, a consensus must be reached.

71. Ms. LINEHAN (Australia) said that the draft statute for an international criminal court formed a suitable basis for negotiation. Her delegation agreed that the court should be a permanent institution but should sit only when it was necessary to hear a case. It was convinced that the court must occupy a clear place within the United Nations system in order to ensure its universality, authority and effectiveness. That could be achieved if it were a subsidiary organ of the United Nations or if it had a formal relationship with the Organization. Her delegation agreed that the court should be established under a multilateral treaty and believed that, in future negotiations on the statute, States should focus on the details of the court's relationship to the United Nations and on practical matters such as the financing of its activities, taking into account, in particular, the fact that the Security Council would be able to refer matters to the court under Chapter VII of the Charter of the United Nations.

72. It was important that the Court should have jurisdiction over the most serious crimes of concern to the international community, whether such crimes were covered by treaties specified in the statute or by general international law. The court must have jurisdiction over crimes under customary international law in order to avoid gaps which might place the perpetrators of atrocious crimes not provided for in treaties outside the jurisdiction of the court. Her delegation was pleased that the statute identified particular crimes rather than making a reference to general international law.

73. It noted with satisfaction that the jurisdictional provisions had been simplified, making them more understandable to non-specialists. Her delegation also endorsed the basic approach in draft articles 21 and 22, whereby the court would exercise jurisdiction on the basis of consent by the parties, except in cases of a breach of the Convention on the Prevention and Punishment of the Crime of Genocide or where the Security Council referred a matter under Chapter VII of the Charter. It might have been preferable to give States the option of declaring their acceptance of the court's jurisdiction with respect to specified crimes, even though that might limit its effectiveness; perhaps that would have ensured a more widespread acceptance of the statute. The current draft allayed the concerns of some countries about a possible loss of sovereignty or duplication of existing court systems. The provision that the underlying premise of the statute was that the court should be complementary to national criminal justice systems where such procedures were unavailable or ineffective was most welcome. In that connection, the Commission had recognized the need to guarantee the rights of the accused and ensured that the statute contained provisions which embodied relevant fundamental human rights standards and standards drawn from national criminal law systems.

74. In sum, the draft statute represented a balanced effort which resolved many of the difficulties that arose in the establishment of such a court. The next step must now be taken, namely the convening of a preparatory conference for a diplomatic conference, to be held in 1996, in order to adopt the statute.

75. Mr. TRAUTTMANSDORFF (Austria) said that he had read the Commission's report carefully; in addition to other valuable contributions, it contained two completed drafts: the draft statute for an international criminal court and the draft articles on the law of the non-navigational use of international watercourses.

76. Austria attached great importance to the establishment of an international criminal court and it fully supported the statement made by the representative of the European Union. The codification process should continue in the most expeditious manner possible, but without detriment to the quality of the text ultimately to be adopted by Member States.

77. The aim was not to superpose an international criminal jurisdiction over national law. The court was expected to fill the gaps left by domestic law, which hindered the prosecution of some of the most detestable crimes of modern times. Essentially, the court should be an international legal institution that would complement national criminal jurisdiction and contribute to the enforcement of national law. Serious crimes against mankind often went unpunished because they were committed in situations of armed conflict which prevented the domestic law enforcement systems from functioning effectively. Recently, there had been many examples of such cases and they continued to occur even at the present time. Accordingly, an international criminal court that rested on firm legal and institutional bases and enjoyed wide acceptance could serve as an effective instrument for bringing the perpetrators of such crimes to justice.

78. In principle, the draft statute met those requirements, although there remained numerous shortcomings due, mainly, to the complicated and sensitive nature of the subject and perhaps, also, to some misconception as to the purpose and functioning of the court. Austria had formulated some comments on those shortcomings, which were contained in document A/CN.4/458/Add.7.

79. As for the procedure to be followed, he believed that the international criminal court should be established on the basis of an international convention adopted at a conference of plenipotentiaries. Such a conference should be held no later than 1996, in which case 1995 could be used to further improve the text of the draft statute. Accordingly, a preparatory committee should be established during the current session, with a clear mandate to deal with the procedural and the substantive preparations for the conference of plenipotentiaries.

80. With regard to the draft code of crimes against the peace and security of mankind, he welcomed the further progress which the Commission had made. Once adopted, that code would be an important additional basis for the legal rules to be applied by the court.

81. With regard to the subject of State responsibility, the draft articles had a long way to go before they reached the required level of maturity, for there were still many questions that merited in-depth analysis. The debate concerning the concept of "international crime" for example, had entered a difficult phase,

and he wondered whether there was not a risk of forgetting the basic concept of what the codification process was intended to achieve. None the less, the Commission's use of a questionnaire to structure the debate had produced positive results, setting a precedent which, as the Commission itself had pointed out in paragraph 233 of its report, ought to be repeated. In any event, the basic question of whether the concept of crime could constitute an indispensable element of the codification of the rules on State responsibility had yet to be answered.

82. Nor was there consensus in the Commission regarding such other central issues such as, for example, whether the term "crime" was properly used in the draft; whether the list or wrongful acts to be qualified as crimes set forth in paragraph 3 of article 19 of Part One of the draft articles was satisfactory; whether a State could incur criminal responsibility and who was competent to determine that a "crime" had been committed in a given case.

83. In view of those differences of opinion, it might be advisable to explore the possibility of trying a different approach to the problem, as had been suggested in the debate in the Commission, on the basis of two combined elements, namely, a more sophisticated elaboration of the consequences of violations of erga omens obligations and a more direct link with the draft code of crimes against the peace and security of mankind, so as to make the code, when adopted, applicable to all violations of the special category of erga omens obligations.

84. Accordingly, the primary objective of the codification process was not to establish a regime of criminal law regulating the behaviour of States, which was unlikely to come about, but to codify widely accepted international legal procedures for settling peacefully the consequences of State responsibility for injuries caused to other States. In other words, codification efforts should focus on a workable procedure to be applied prior to taking countermeasures.

85. The use of such a concept of crime as a qualifying element for determining the procedures to be followed prior to taking countermeasures, on the one hand, and for determining the quality of such measures, on the other hand, seemed problematic to say the least. Such a use of the notion of crime, in the absence of an effective international authority which would decide when such a crime had been committed and would apply punitive measures, also seemed risky, if not counterproductive. Moreover, application of the classic notion of crime might destroy the fine balance of interests which must be maintained between injuring and injured State in order to give dispute settlement procedures prior to taking countermeasures a chance of being effective. It should not be forgotten that, in practice, such procedures would be applied less to grave breaches of international law than to cases of limited injuries in an environment of highly intensified and diversified transboundary relations. In many instances, procedures prior to the adoption of countermeasures might help to prevent escalation of measures and countermeasures which might be triggered by a relatively minor violation.

86. It seemed obvious that, with regard to articles 11 to 14 of Part Two of the draft articles, the Drafting Committee - and possibly a majority of the Commission - were at odds with the Special Rapporteur on important points of substance. The arguments in favour of a separate category of "interim measures of protection" did not seem fully convincing. In the first place, it might lead to confusion since it might be interpreted as including, inter alia, the right to suspend or terminate a treaty in accordance with article 60 of the Vienna Convention on the Law of Treaties. Yet such suspension or termination was a "measure of protection" established by the primary norm system of the law of treaties and had nothing whatever to do with the secondary norms of State responsibility. Secondly, while the Special Rapporteur stated that the concept of interim measures of protection was a rather broad one, he also said that it could not be stretched beyond reasonable limits (A/CN.4/461, Add.2, art. 12), and a subjective element of "reasonableness" made "interim measures of protection", in practice, indistinguishable from countermeasures. Thus the text prepared by the 1993 Drafting Committee, which did not refer to interim measures of protection, was preferable.

87. There was also an apparent difficulty in formulating the requirement for legitimate countermeasures in article 12. The difficulty was caused by the necessity of striking an equitable balance between the legitimate claim of the injured State to obtain redress of the (wrongfully) caused injury and the protection of an alleged law-breaking State against rash or arbitrary action by the self-proclaimed victim. In a phase where no objective assessment had yet taken place, it would be more equitable and realistic to give the choice of the dispute settlement procedure to the alleged law-breaker in order to avoid the impression of a diktat. To achieve that balance, the structure of article 12 as proposed by the Drafting Committee in 1993 should be retained, but the opportunity it gave to the alleged law-breaking State to have recourse to a dispute settlement procedure should be transformed into a right of that alleged law-breaking State. The injured State would also be protected, since it could apply countermeasures as long as the alleged law-breaking State did not offer an effective dispute settlement procedure. Formulated that way, the provision would induce the parties to seek the settlement of their dispute in an appropriate procedure.

88. Finally, his delegation noted with appreciation that the Commission had completed two very important tasks and was initiating consideration of "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", for which it had appointed Special Rapporteurs. He hoped that the Commission would continue, in its future annual reports, to indicate those specific issues on which expressions of views by Governments were invited, given the excellent results achieved so far with that procedure. Finally, he trusted that the International Law Seminar would remain operational; the Austrian contribution to the Trust Fund had shown the special interest attached to the Seminar by his Government.

89. Mr. ECONOMIDES (Greece) said that the inherent jurisdiction of the Court which, according to article 20 of the draft statute for an international criminal court, was restricted to the crime of genocide, should be extended to the crimes listed in article 20 (b), (c) and (d).

90. The analogy made by the Commission between the International Court of Justice and the international criminal court was legally erroneous and politically deplorable, for three reasons. Firstly, because the International Court of Justice was an early twentieth-century institution, whereas the criminal court would belong to the next century, and much change had taken place between those two times, especially in the field of international criminal law. Secondly, the Statute of the Court was annexed to the Charter of the United Nations and, consequently, the States parties to the Charter were ipso facto parties to the Statute of the Court; it was understandable that States were allowed to choose whether to accept the optional jurisdiction of the Court, whereas according to the Commission's recommendation, the statute of the criminal court would be a completely autonomous international convention which could regulate, for example, the court's jurisdiction. Thirdly, because the jurisdiction of the Court was general and could deal with any type of legal dispute, while the jurisdiction of the criminal court would be extremely specialized in the humanitarian field, since its mission was to punish the most serious international crimes against the fundamental interests of humanity. Furthermore, it should be emphasized that the crimes listed in article 20 of the draft statute were violations of well-established norms of general international law of a peremptory nature (jus cogens).

91. The current drafting of article 22 excessively restricted the court's jurisdiction, and could make it problematic in practice. On a strictly legal level, he also wondered whether a State which became a party to the statute could, in its declaration of acceptance of the court's jurisdiction, exclude certain crimes which were prohibited by peremptory rules, and whether such an exclusion would not, in effect, be tantamount to a reservation eliminating a rule of jus cogens. For that reason, article 20 should adopt the solution of ipso facto jurisdiction, i.e. without any special declaration of acceptance by the State party of the international criminal court in respect of genocide and the other crimes referred to in article 20 (b), (c) and (d).

92. Referring specifically to the draft statute, he said that in article 23, regarding action by the Security Council, paragraph 2 was unnecessary and should be deleted, since the criminal court itself would be perfectly capable of taking note of an act of aggression. No such limitation had been placed on the International Court of Justice itself; its jurisdiction extended to all matters specially provided for in the Charter of the United Nations, including matters having to do with refraining from the threat or use of force. It would then be necessary to adopt a more toned-down solution, whereby if the Security Council made a positive or negative decision, the court would be bound by that decision, but if the Security Council made no decision, the court would be at liberty to exercise its jurisdiction. The draft statute should also expressly mention the Code of Crimes against the Peace and Security of Mankind, which, once completed, would strengthen it. Regarding article 35, "Issues of admissibility", he

considered it superfluous. Lastly, the text of article 59 should state that the court would supervise the enforcement of prison sentences in accordance with provisions that it would itself adopt.

93. Regarding the draft Code of Crimes against the Peace and Security of Mankind, he made the following points. Regarding article 1, a simple list of the crimes, without definitions, would suffice. Article 4, on the subject of motives, should be deleted; it was too general and of dubious usefulness. Article 7, regarding non-applicability of statutory limitations, should be considered again at a later stage, when all the provisions of the code would be known. Articles 8, 9 and 10 should as far as possible be harmonized with the corresponding provisions of the draft statute for an international criminal court. Article 14 should be restricted to self-defence, excluding the notions of coercion and state of necessity.

94. Regarding section III, on the law of the non-navigational uses of international watercourses, he said the change introduced into article 7 had destroyed a compromise solution which had been arrived at after many years of work. As a result, everything depended on the notion of "due diligence", and a State could legally cause significant harm to other watercourse States provided that it did so within the limits of that "due diligence". In the current version, what counted was diligent action, a subjective element, rather than the objective element of significant harm. The new version should therefore be rejected in favour of the previous version. Regarding article 33, on the subject of the settlement of disputes, he considered it to be insufficient in the light of the importance of the draft. In addition to compulsory conciliation, it should include binding procedures such as arbitration and judicial settlement.

95. Regarding Section IV, "State responsibility", he supported the conclusions of the Special Rapporteur concerning article 19 of the draft and the consequences of the distinction between crimes and delicts. The idea underlying that distinction was that, in the case of an international crime, especially aggression, the offending State would be confronted by not only the victim State, but also the entire international community, whereupon the question would become universal instead of bilateral. That solution was in the interest of the international legal order.

96. Regarding section V, "International liability for injurious consequences arising out of acts not prohibited by law", he suggested that the expression "risk of causing significant transboundary harm", contained in article 2 (a), seemed somewhat tautologous; the definition of the term "significant" in paragraph (4) of the commentary was greatly preferable. Also, in article 17, "National security and industrial secrets", the word "vital" should be replaced by a less strong term.

97. In conclusion, he thanked all the Special Rapporteurs who had produced the reports on the various items considered by the Committee.

The meeting rose at 1.15 p.m.